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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE BORDEAUX, Defendant and Appellant.	B200449 (Los Angeles County Super. Ct. No. MA034957)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Murphy, Commissioner (pursuant to Cal. Const., art. I, § 21). Affirmed.

Cannon & Harris, Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Michael Lee Bordeaux guilty of unlawful taking or driving of an automobile. (Veh. Code, § 10851, subd. (a).) Defendant admitted that he suffered a robbery conviction (Pen. Code, § 211[1]) in 1983 in case number A805923 for which he was sentenced to three years in state prison; that he suffered two robbery convictions (§ 211) and two violations of section 245 in 1986 in case number A811121. The trial court sentenced defendant to the upper term of three years for his unlawful taking or driving of an automobile conviction, doubled as a second strike at the request of the prosecutor under the Three Strikes law plus an additional three years under section 667.5, subdivision (b).

On appeal, defendant contends the trial court erred in denying his *Wheeler*[2]*/Batson*[3] motion, the prosecutor engaged in misconduct, the trial court erred in failing to instruct the jury to view defendant's out-of-court statement with caution, and the cumulative effect of the trial court's errors and the prosecutor's misconduct rendered defendant's trial fundamentally unfair and the verdict constitutionally unreliable. We affirm.

BACKGROUND

During the morning of April 7, 2006, Sergio Begue's black Toyota Forerunner, license plate number 4NGK919, was parked in the driveway of the Begue family's home in Lancaster. About 6:40 that morning, Sergio's wife Stella started the Forerunner's engine in preparation for taking her children to school. Stella left the Forerunner unlocked and with its engine running and went inside to get her children. When Stella

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[1] All statutory references are to the Penal Code unless otherwise noted.

[2] *People v. Wheeler* (1978) 22 Cal.3d 258.

[3] *Batson v. Kentucky* (1986) 476 U.S. 79.

went back outside three to five minutes later, the Forerunner was gone. Sergio called the police.

Shortly thereafter, about 7:25 a.m., Los Angeles County Sheriff's Department Deputy Jeff Larson heard a radio call concerning the theft of a black Toyota Forerunner, license plate number 4NGK919. Two to three minutes later, Deputy Larson saw a black Forerunner traveling eastbound down the driveway of the Tropic Motel. As Deputy Larson neared the Forerunner and slowed his patrol car, he recognized the Forerunner's license plate as the license plate described in the radio call. Defendant was driving the Forerunner. Deputy Larson made eye contact with defendant as he passed the Forerunner.

After Deputy Larson passed the Forerunner, defendant began backing the Forerunner up the driveway. Deputy Larson made a U-turn and drove up the driveway. Deputy Larson apparently lost sight of the Forerunner momentarily. When Deputy Larson next saw the Forerunner, it was "rolling back out of this little cutout" of the motel and defendant was walking away from the still-rolling Forerunner and in the direction of Deputy Larson and his partner, Sergeant Brown. Deputy Larson did not see anyone else near the Forerunner. The deputies ordered defendant to the ground. According to Deputy Larson, once defendant was on the ground he said that "the guy we were looking for ran and jumped the fence." At that time, Deputy Larson had not told defendant he was looking for "some guy" and had not asked defendant any questions. Deputy Larson later learned that defendant was a registered guest of the Sands Motel that was next door. Deputy Larson testified that he did not know of any fingerprints having been taken out of the Forerunner.

Josephine Bordeaux, defendant's sister, testified that she sent defendant money in early April, prior to his arrest, so that he could visit her in Sacramento on the Friday that the Begues' Forerunner was stolen. After defendant's sister sent defendant the money, defendant called her to tell her that he had received the money.

DISCUSSION

I. *Wheeler/Batson*

Defendant contends that the trial court erred in denying his *Wheeler/Batson* motion with respect to the prosecutor's use of peremptory challenges to excuse prospective juror number four and former prospective juror number 17[4]. The trial court did not err.[5]

The state and federal Constitutions prohibit an advocate from using peremptory challenges to exclude jurors based on race. (*People v. Lenix* (2008) 44 Cal.4th 602, 612.) In *People v. Wheeler, supra,* 22 Cal.3d 258, the California Supreme Court held that "the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16, of the California Constitution." (*Id.* at p. 272.) A prosecutor violates that right by using peremptory challenges to strike prospective jurors who are "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds," when the challenges are made "on the sole ground of group bias." (*Id.* at p. 276.) The United States Supreme Court has held that a prosecutor's discriminatory use of peremptory challenges violates a defendant's right to equal

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[4] When the prosecutor used a peremptory challenge to excuse this prospective juror, the juror was seated as prospective juror number four. The prospective juror previously was identified as prospective juror number 17. To avoid confusion with prospective juror number four discussed above, we refer to this prospective juror as "former prospective juror number 17."

[5] In connection with his claim that the prosecutor used these peremptory challenges in a discriminatory manner, defendant notes, as he did in the trial court, that the prosecutor challenged for cause an African-American juror (prospective juror number 16), and the trial court granted the prosecutor's challenge. Defendant does not contend on appeal that the trial court erred in granting this challenge for cause or explain how this challenge for cause is relevant to his contention that the prosecutor exercised peremptory challenges in a discriminatory way.

protection under the Fourteenth Amendment to the United States Constitution. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 88.)

A trial court employs a well-defined procedure for resolving a *Wheeler/Batson* motion. "The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims. [Citations.]" (*People v. Lenix*, *supra*, 44 Cal.4th at pp. 612-613; *Johnson v. California* (2005) 545 U.S. 162, 168.)

In order to preserve a *Wheeler/Batson* claim for appellate review, a defendant must timely object in the trial court. (*People v. Morrison* (2004) 34 Cal.4th 698, 709-710; *People v. Bolin* (1998) 18 Cal.4th 297, 316.) "Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. (*People v. Bonilla* [(2007)] 41 Cal.4th [313,] 341-342.) 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' (*People v. Burgener* (2003) 29 Cal.4th 833, 864 [129 Cal.Rptr.2d 747, 62 P.3d 1].) [Footnote omitted.]" (*People v. Lenix, supra,* 44 Cal.4th at pp. 613-614.) In fulfilling its obligation to make a sincere and reasoned effort to evaluate the prosecutor's explanation, "the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.

This is particularly true where the prosecutor's race-neutral reason for exercising a peremptory challenge is based on the prospective juror's demeanor, or similar intangible factors, while in the courtroom." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.)

A. Prospective Juror Number Four

After the prosecutor used a peremptory challenge to remove prospective juror number four, defense counsel stated that there was a relatively small number of African-Americans on the jury panel, that defendant was African-American, that the prosecution had challenged an African-American prospective juror (prospective juror number 16) for cause, and that prospective juror number four was an African-American woman. Defense counsel stated that he was not making a *Wheeler* motion, but asked the trial court to have the prosecutor state a race neutral reason for excusing prospective juror number four in light of the prospective juror's responses. The prosecutor responded that she did not believe she was under an obligation to provide a race-neutral explanation for excusing prospective juror number four because defense counsel was not making a *Wheeler* motion. The trial court agreed and directed the prosecutor to not make a record.

On appeal, defendant contends the trial court erred in failing to require the prosecutor to state her justification for challenging prospective juror number four. Defendant describes prospective juror number four as a "natural prosecution juror" based on her answers in voir dire and notes that the prosecutor did not ask this prospective juror any questions before using a peremptory challenged to excuse her.

Respondent contends that defendant "defaulted" his *Wheeler/Batson* issue with respect to prospective juror number four by his failure to make the appropriate motion in the trial court. Acknowledging that "defense counsel unfortunately chose to tell the court that he was not making a *Wheeler* challenge," defendant nevertheless argues that defense counsel actually did make such a motion by "pointing out that the prosecutor was systematically excluding African-American jurors and asking the court to require the prosecutor to state a race-neutral reason for the challenges." Defense counsel's assertion that that he was not making a *Wheeler/Batson* motion is clear and not subject to

interpretation. Defendant's failure to make a *Wheeler/Batson* motion, forfeited review of his claim that the prosecutor excused prospective juror number four for discriminatory reasons. (*People v. Morrison*, *supra*, 34 Cal.4th at pp. 709-710; *People v. Bolin*, *supra*, 18 Cal.4th at p. 316.)

Defendant contends that he was relieved of any deficiency in defense counsel's objection as to prospective juror number four by defense counsel's statement in connection with defendant's subsequent *Wheeler/Batson* motion as to former prospective juror number 17. In that later motion, defense counsel stated, among other things, that the prosecutor previously had excused a prospective African-American female juror – apparently prospective juror number four. In connection with this later motion, the prosecutor asked the trial court if defendant's motion also concerned prospective juror number four. The trial court stated that the motion related only to former prospective juror number 17. Defense counsel did not dispute the trial court's description of his motion. When the prosecutor later asked the trial court if it wanted her to give an explanation for her excusal of prospective juror number four and the trial court apparently asked defense counsel, "Anything on that?" defense counsel responded, "Submitted, your Honor." Accordingly, defendant's statement about prospective juror number four in connection with his *Wheeler/Batson* motion as to former prospective juror number 17 was not a *Wheeler/Batson* motion as to prospective juror number four.

B. Former Prospective Juror Number 17

When the prosecutor used a peremptory challenge to excuse former prospective juror number 17, defense counsel made a *Wheeler/Batson* motion stating that the prosecutor had challenged for cause an African-American (presumably prospective juror number 16), had excused an African-American woman (presumably prospective juror number four), and now was challenging another African-American woman. Defense counsel described former prospective juror number 17 as a C.P.A. who had a "very professional appearance," was "very well spoken," and appeared to be "very intelligent."

Defense counsel stated there was nothing "out of the ordinary" in former prospective juror number 17's responses in voir dire.

The trial court found that defendant had made a prima facie showing that the prosecutor exercised a peremptory challenge based on race and requested the prosecutor to explain why she had challenged former prospective juror number 17. As discussed above, the prosecutor inquired of the trial court if defense counsel was making a *Wheeler* motion as to both prospective juror number four and former prospective juror number 17, and if she was to provide an explanation for her challenge to both prospective jurors or just to former prospective juror number 17. The trial court responded that the challenge was to former prospective juror number 17 and stated that "Counsel is simply making a record."

The prosecutor stated her reasons for using a peremptory challenge to excuse former prospective juror number 17 as follows:

"I excused this person based on her physical appearance as she came in yesterday. She was wearing 5-inch heels, red pumps. She had gray, 3-inch claw nails. She had folded arms the entire time. She was wearing a spider pin. Her entire appearance seemed to me like the type of person who has her own personality, someone who is not afraid to be different, someone who may be a problem in the jury room, a problem participating with other jurors, someone who can maintain her position and, therefore, possibly hang the jury. [¶] And based on her physical attire, based on her folded arms – her arms were folded the entire time – and based on the fact that her – not only were her arms folded, but during jury voir dire, her back was also turned to me at times. [¶] But based on her physical appearance, your Honor, the nails, the heels, it seemed like she is not the type of person who is going to fit into the overall jury because she is an individual or has individual characteristics that are separate and apart from the others in the room. It had nothing to do with whatever her race may be, which I did not even perceive her to be African-American. She seemed interracial."

As discussed above, the prosecutor then asked the trial court if it wanted her to provide an explanation for the "woman from yesterday that the defense attorney was not

making a *Wheeler* motion on." The trial court said, apparently to defense counsel, "Anything on that?" Defense counsel responded, "Submitted, your honor." The trial court then denied defendant's *Wheeler/Batson* motion, stating only, "Denied," and providing no analysis or elaboration. After a prospective juror was seated in former prospective juror number 17's place, the parties accepted the venire as constituted.

On appeal, defendant states that the prosecutor asked former prospective juror number 17 only four questions – none of which, defendant asserts, reasonably can be seen as exploring whether the prospective juror would fit in with the jury or refuse to deliberate – and contends that all of former prospective juror number 17's answers to questions in voir dire were either neutral or favored the prosecutor. Defendant thus concludes that the "only reason" the prosecutor challenged this prospective juror "must have been" the "color of her skin, something that inclined the prosecutor to believe that the juror was of inter-racial ancestry."

The prosecutor gave race-neutral reasons for excusing former prospective juror number 17 – citing the prospective juror's "appearance" and what her appearance indicated to the prosecutor about the prospective juror's demeanor and ability to deliberate and reach a verdict. The prosecutor described the manner in which the prospective juror was dressed and stated that the prospective juror's arms were folded "the entire time" and her back was turned to the prosecutor "at times." These factors, the prosecutor explained, caused her to believe that former prospective juror number 17 might be unable to fit in with the jury, might be a "problem," and might cause the jury to be unable to reach a verdict. A trial court's implied finding that a prosecutor's stated reasons for exercising a peremptory challenge to excuse a prospective juror were sincere and genuine is entitled to great deference where, as here, the prosecutor's reasons are based on the prospective juror's appearance and demeanor. (*People v. Ward* (2005) 36 Cal.4th 186, 202, citing *People v. Reynoso*, *supra*, 31 Cal.4th at p. 926.) We defer to the trial court's implied finding.

II. Prosecutorial Misconduct

Defendant contends that the prosecutor committed repeated acts of misconduct during voir dire and in closing argument. We find no prejudicial misconduct.

A prosecutor's trial conduct "'"violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Prosecutors have "broad discretion to state [their] views regarding which reasonable inferences may or may not be drawn from the evidence." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Hill* (1998) 17 Cal.4th 800, 819 [a prosecutor's argument to the jury "'"'may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]'"'"'].) However, a prosecutor commits misconduct if he refers to matters outside the record in argument to the jury. (*People v. Cunningham*, *supra,* 25 Cal.4th at p. 1026.) To establish prejudice, the defendant must demonstrate a reasonable probability that he would have received a more favorable result in the absence of the prosecutor's alleged misconduct. (*People v. Bell* (1989) 49 Cal.3d 502, 542.)

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva* (2001) 25 Cal.4th 345, 373.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if

either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*People v. Hill, supra,* 17 Cal.4th at pp. 820-821.)

A. Voir Dire

While addressing the concept of reasonable doubt, the prosecutor, in voir dire, prefaced a question to a prospective juror as follows: "There are two sides in every case, right? . . . [¶][¶] There's the People's side and then there's the defendant's version of what happened." The prosecutor explained to the prospective juror that a defendant legally does not have to testify or present evidence and stated, "But even when they don't put on any evidence, which they don't have to because it's our burden as the prosecution and it should be our burden, because that's out [sic] system, I should be put to my burden of proving that he is guilty beyond a reasonable doubt, and that's the way the law should be. [¶] But even when the defense doesn't put on evidence or when they do put on evidence, they have the burden, right? Either way, 'It wasn't me, it's someone else. I didn't do it.' Right? There's always that version, whether or not you hear it. It's always their side. And then there will be the People's side, right? The People's explanation of what happened."

The prosecutor then asked the prospective juror, "Just the fact that there are two sides, just the fact that there's the version of 'it wasn't me,' does that create reasonable doubt in your mind automatically?" After the prospective juror responded, the prosecutor asked the panel, "Does anybody think just because there are two sides – and in every case there's two sides – does anybody think just because there are two sides, that's reasonable doubt and that person cannot be guilty? [¶] Right. Because, think about it, if that were the case, no guilty person would ever be convicted, right, because there's always two

sides in every case. Always." Defense counsel did not object that the prosecutor's preface or question were misconduct, thus forfeiting any claim on appeal with respect to the prosecutor's preface and questions. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva, supra,* 25 Cal.4th at p. 373.)

Shortly thereafter, the prosecutor asked the jury panel, "Does anybody disagree with the idea that every day guilty people take their case to trial or cases go to trial every day?" Next, the prosecutor stated the following hypothetical to a prospective juror: "Let's say you go to Starbucks, right, and you take your laptop with you. You're sitting there working on your laptop and you leave the laptop on the table for a few minutes, go to the bathroom. It's a public place. There are people there. You come back out. The laptop is gone. [¶] What do you think happened to the laptop?" After receiving the response that the laptop had been stolen, the prosecutor asked the panel if anyone would blame the laptop's owner for leaving the laptop on the table and whether anyone believed that someone had a right to take the laptop.

At the time the prosecutor asked the question about guilty people taking their cases to trial every day and advanced the Starbucks hypothetical, defense counsel did not object that the prosecutor's question or hypothetical were misconduct – thus forfeiting appellate review of either instance of alleged misconduct. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva, supra,* 25 Cal.4th at p. 373.) Instead, after the prosecutor finished questioning the prospective jurors a short time later, defense counsel stated, outside the presence of the jury, that there was an "issue" he wanted to put on the record. Defense counsel stated that he did not think the prosecutor was in a position to tell the prospective jurors that guilty people go to trial every day, expressed doubt that there is empirical evidence to support such an assertion, and requested that the jury be admonished not to form an opinion about defendant's guilt based on the prosecutor's assertion.

The trial court stated that the prosecutor's statement "sort of flies in the face of the presumption of innocence," but suggested that an admonishment would draw more attention to the statement. The trial court stated that it was going to admonish the

prosecutor to not use the "phrase" again. Defense counsel stated, "I hear what the court is saying, and now that I think about it, I kind of agree with the court as opposed to harping on that issue." Defense counsel withdrew his request for an admonishment. Because an admonishment would have cured any harm from the prosecutor's statement, defense counsel's withdrawal of the request for an admonishment abandoned this claim for purposes of appeal. (See *People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva, supra,* 25 Cal.4th at p. 373.)

Next, defense counsel stated that he objected to the prosecutor's Starbucks hypothetical "going any further." Defense counsel stated that "to some extent" the hypothetical asked the prospective jurors to put themselves in the victim's shoes. Defense counsel stated that any information to be elicited from such a question could be elicited without injecting the prospective jurors into the hypothetical. The prosecutor responded that she was trying to make the question more interesting and easier to follow. The trial court asked the prosecutor if she would have a problem with phrasing the question without putting the prospective jurors in the victim's position. The prosecutor responded that "It just makes it a more boring type of jury voir dire," but that she would rephrase the question if that was the trial court's order. The trial court stated that it was not issuing such and order and that it was "going to have to think this thing through." Then, apparently addressing defense counsel, the trial court stated, "All right. Does that help you?" Defense counsel responded, "Yeah," but stated that "it was actually an objection," and asked that the trial court admonish the prosecutor not to rephrase the question in any way that put the prospective juror's in the victim's shoes. The trial court overruled defense counsel's objection, stating that it was going to revisit the issue after it have a chance to think it through.

It is misconduct to ask the jury to view a crime through the eyes of the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other ground in *Stansbury v. California* (1994) 511 U.S. 318.) In this case, the prosecutor's Starbucks hypothetical did not ask the prospective juror to view the crime through the Begues' eyes. Fairly construed, the prosecutor's hypothetical concerned whether the prospective jurors would

blame a victim for making their property easier to steal – here, Stella Begue leaving the Forerunner unlocked in the driveway with its engine running. Such a hypothetical does not constitute improper conduct amounting to misconduct. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

Later in voir dire, the prosecutor asked a prospective juror "who do you think has more of a reason to lie, in general, in life, someone who actually has a reason to lie or someone who has absolutely no motive to lie? When the prospective juror responded that there is no way to determine if someone is lying, the prosecutor responded, "Sure. But if that person has absolutely no motive to lie versus somebody who has a motive to lie because lying maybe will get them out of trouble." Defense counsel objected and requested a sidebar conference.

At the sidebar conference, defense counsel stated that the prosecutor had pointed her finger at defendant when she talked about lying to get someone out of trouble. Defense counsel argued that the prosecutor's statement about lying started to address, in a "very premature way," whether defendant would testify and amounted to argument that should be made in closing argument and not voir dire. The prosecutor responded that she was merely addressing a line of questioning by defense counsel concerning whether the prospective jurors were aware of situations when police officers lied and that she was trying to determine if the prospective juror believed that a person needs a motive to lie or will simply lie. After further discussion, defense counsel stated that this was the second or third time that the prosecutor had asked inappropriate questions in voir dire and that he was "not an inch and a half away" from moving for a mistrial based on prosecutorial misconduct.

The trial court stated that it thought the prosecutor's statement about lying to get out of trouble was inappropriate and asked the prosecutor to not repeat that statement. The trial court asked the parties if the issue was resolved. Defense counsel responded, "It appears to be." Defense counsel's apparent satisfaction with the trial court's resolution of this issue and his failure to request the jury be admonished, forfeits appellate review of

this issue. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva, supra,* 25 Cal.4th at p. 373.)

Even if defendant had not forfeited review of this issue, defendant's claim of prosecutorial misconduct as to the prosecutor's statements about lying fails. Defendant contends that the prosecutor's inquiry about lying might have been acceptable in the abstract, but was improper in this case because the prosecutor pointed to defendant as she asked the question, thus conveying to the prospective jurors that defendant would testify and would lie to get out of trouble. The prosecutor's statement would not reasonably be construed by a prospective juror as stating that defendant would testify. Moreover, because defendant did not testify, there was no prejudice from any assertion by the prosecutor the defendant would lie if he testified. Thus, defendant cannot demonstrate a reasonable probability that he would have received a more favorable result in the absence of the prosecutor's alleged misconduct. (*People v. Bell,* 49 Cal.3d at p. 542.)

Later in voir dire, the prosecutor prefaced a question thusly: "Now, defense counsel brought up the issue of race and told you not to consider race, and I am going to say 'Yes,' don't consider race because once you hear all of the evidence, you will realize that race has nothing to do with anything." Defendant contends this was a misstatement of the law given the cross-racial implications of Deputy Larson's identification of defendant as the person who was driving the Begues' car. The prosecutor's statement is not misconduct because a reasonable juror would have interpreted the prosecutor's statement as advising him or her not to consider defendant's race in deciding on defendant's guilt. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.) Moreover, even if we were to construe the prosecutor's statement as having misstated the law, any such misstatement was harmless because cross-racial identification was not an issue in this case as defendant did not present any evidence concerning difficulties in cross-racial identifications. (*People v. Bell, supra,* 49 Cal.3d at p. 542.)

Finally, following up on a prospective juror's response to a hypothetical apparently concerning the evaluation of circumstantial evidence, the prosecutor stated, "What about the fact that there are two sides in every case? There are two sides, People's

side, defendant's version." Defense counsel objected and moved for a mistrial based on prosecutorial misconduct. Defense counsel stated that the prosecutor had misled the jury because there are not two sides in every case. Defense counsel argued that the defense was under no burden to provide a theory or "other side" of a case and the prosecution might fail to prove its case beyond a reasonable doubt. Defense counsel asserted that this was the third or fourth time that the prosecutor has "done this" in voir dire. The trial court agreed with the prosecution's theory that there are two sides to every case and denied the motion for mistrial.

Defendant contends that the prosecutor's statements about there being two sides to every case were intended to predispose the jurors to discount any defense defendant may have presented. The prosecutor's statements are a misstatement of law, defendant reasons, because it is not true that there always are two sides to every case or a defense version of the facts – a defense can be premised on the prosecution's failure to prove a charged offense or even a single element of a charged offense beyond a reasonable doubt. Moreover, defendant contends, the prosecutor's statements suggested to the jurors that they should expect defendant to testify.

The prosecutor's statement that there are two sides to every case does not constitute misconduct and did not suggest to the jurors that they should expect defendant to testify. There are, in fact, two sides to every case – a defendant is on trial because the prosecution believes he is guilty of a criminal offense and defendant has not admitted his guilt. Even a defense that asserts that the prosecution has failed to prove a single element of a charged offense has two sides – the prosecution's side that the element has been proved beyond a reasonable doubt and the defendant's side that it has not. The statement that a defendant has a different side to the case than the prosecution did not suggest to the prospective jurors that the defendant would testify because reasonable jurors understand that a defense may consist of evidence other than a defendant's testimony, and the prosecutor told the prospective jurors that defendant was under no obligation to testify.

B. Closing Argument

Defendant contends that the prosecutor committed misconduct when she began her closing argument by stating to the jury, "Ladies and gentlemen, we live in a society that is so crime ridden that oftentimes we become desensitized to what is going on. I mean, think about it: how often do we turn around and look when a car alarm goes off, right? Half the time we don't because we hear it so often. It's almost a daily thing. It's a very common thing. It's a common problem. Car theft is a common problem. [¶] It's an important common crime because it has victims and it impacts people such as the people that you've seen in this trial, Mr. and Mrs. Begue. And since we are not willing to put our lives at risk to go out and investigate crime, to go out and stop thieves, to go out and catch the criminals who hurt us, we have peace officers who do that for us."

Defendant contends that this part of the prosecutor's closing argument is misconduct because it appealed to the passion or prejudice of the jury and referred to matters not in the record. The prosecutor compounded her misconduct, defendant contends, by telling the jurors that peace officers investigate crimes because "'we are not willing to put our lives at risk' to catch thieves and 'the criminals who hurt us,'" thus suggesting to the jury that the prosecutor knew defendant to be a person who was dangerous. Defendant's failure to object to this claimed misconduct forfeited appellate review. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva, supra,* 25 Cal.4th at p. 373.)

Defendant next contends that the prosecutor committed misconduct when she stated to the jury that the defense could have subpoenaed Deputy Brown to testify but did not do so because they knew his testimony would not help their case. Defendant contends the prosecutor's statement was misconduct because the statement implied that Deputy Brown would corroborate Deputy Larson's testimony, it suggested to the jury that the prosecutor knew something that the jury did not, and it subtly vouched for Deputy Larson's testimony. Defendant did not object that the prosecutor's statement was misconduct, thereby forfeiting appellate review. (*People v. Samayoa, supra,* 15 Cal.4th

at p. 841; *People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Silva, supra,* 25 Cal.4th at p. 373.)

Defendant next contends that the prosecutor committed misconduct when she argued to the jury that Deputy Larson had given credible testimony and that his testimony was sufficient to find defendant guilty. The prosecutor argued that, in light of the single witness testimony instruction,[6] it was improper for the jury to believe Deputy Larson's testimony but to believe it had to hear from other witnesses.[7] Defense counsel objected that the prosecutor's argument was a "misstatement." The trial court overruled defense counsel's objection. The prosecutor's argument was a fair interpretation of the single witness instruction and is not properly viewed as '"'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Samayoa*, *supra,* 15 Cal.4th at p. 841.)

Defendant further contends that the prosecutor committed misconduct when she argued to the jury that defendant's sister had testified that she sent money to defendant but that the jury had "heard no testimony that any money was found on the defendant because there was no money found on the defendant." Defense counsel objected that the argument was not based on any testimony. The trial court stated that it did not recall any such testimony. The prosecutor, apparently to the jury, then stated, "That's what I said, you heard no testimony on it." The trial court followed up, "There was no testimony concerning that." Because the prosecutor promptly clarified her argument and the trial court affirmed that there had been no testimony that no money was found on defendant, defendant cannot demonstrate a reasonable probability that he would have received a

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[6] The jury was instructed with CALCRIM No. 301 that "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

[7] Defendant later notes that the prosecutor subsequently stated that the only way to acquit defendant was to find that Deputy Larson lied in his testimony. The prosecutor's statement in this regard was reasonable based on the evidence. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1026.)

more favorable result in the absence of the prosecutor's alleged misconduct. (*People v. Bell, supra,* 49 Cal.3d at p. 542.)

Finally, defendant contends that the prosecutor committed misconduct when she attempted to bolster Deputy Larson's credibility by commenting on defendant's failure to request that the Forerunner be dusted for fingerprints. The prosecutor stated, "The defense has a right and had a right to request a court order to have that car printed, have that car dusted for prints. Why didn't they request that? Because his prints are all over that car." In response to the prosecutor's statement, defense counsel objected and moved the trial court to strike the prosecutor's comments. The trial court granted the motion. Defense counsel then asked the trial court to be heard outside of the jury's presence and moved for a mistrial based on the prosecutor's asserted "flagrant misrepresentation" of the facts.

In response, the prosecutor argued that she had not misrepresented the facts because the jury had been told by Deputy Larson that fingerprints were not lifted in this case. The prosecutor stated that the she "never said to the jury that prints were lifted and there was a conclusive match, never said that." The prosecutor further explained that she made the statement "Because Deputy Larson observed the defendant inside of the car. Therefore, prints do not have to be lifted to prove the defendant was in the car."

The trial court found that the prosecutor's statement that defendant's fingerprints were all over the car was a misstatement of the evidence and explained that that was why it sustained the defense objection and order the statement stricken. The trial court denied the motion for mistrial, however; it stated that the jury knew that there was no forensic evidence on any kind, including fingerprints. In light of the trial court's denial of the mistrial motion, defense counsel requested the trial court to admonish the jury that the prosecution's statement that defendant's fingerprints were all over the car was pure speculation without any basis in evidence. Instead, the trial court ordered the prosecutor to try to clear up the matter for the jury, stating that it would further admonish the jury if the prosecutor was unsuccessful.

In compliance with the trial court's order, the prosecutor told the jury, "Ladies and gentlemen, you have not heard any forensics evidence in this case. You have not heard any kind of fingerprint testimony in this case. There have been no prints lifted in this case showing one way or the other whether or not there is a match. Okay? And, therefore, forensic evidence is not something that you should be considering in this case, the existence of it or lack thereof. That is not in evidence in this case. And it's not something you should expect to have during your deliberations because they are not necessary. And you've got direct testimony from a deputy who saw the defendant in this car."

It is clear that the prosecutor blatantly misstated the facts when she told the jury that defendant's prints were all over the Forerunner. (See *People v. Hill, supra,* 17 Cal.4th at p. 823 ["Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct"].) Nevertheless, any such misconduct was not so prejudicial as to require reversal. (*People v. Bell, supra*, 49 Cal.3d at p. 542.) The trial court struck the prosecutor's improper statement and the prosecutor subsequently reminded the jury that it had heard no forensic evidence concerning fingerprints and stated that no prints had been lifted in the case "showing one way or the other whether or not there is a match." In addition, the prosecution presented substantial evidence of defendant's guilt so that the denial of the motion for mistrial was not prejudicial. Deputy Larson testified that he saw defendant driving the Begues' stolen Forerunner down the driveway of the Tropic Motel within an hour of the Forerunner having been stolen. Deputy Larson made eye contact with defendant as he passed the Forerunner. After Deputy Larson passed the Forerunner, defendant backed the Forerunner up the driveway. After momentarily losing sight of the Forerunner, Deputy Larson next saw it rolling back from the motel and defendant walking away from the still-rolling vehicle. Deputy Larson did not see any other person near the Forerunner.

III. Instructional Error

Defendant contends that the trial court erred when it instructed the jury with an incomplete version of CALCRIM No. 358. We hold that any such error was harmless.

Trial courts have a sua sponte duty to instruct the jury that "'evidence of oral admissions must be viewed with caution . . . .'" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 94 quoting *People v. Beagle* (1972) 6 Cal.3d 441, 455.) The failure to so instruct is not "'reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error.'" (*Ibid.*, quoting *People v. Beagle, supra,* 6 Cal.3d at p. 455.) "In assessing potential prejudice, . . . the primary purpose of the cautionary instruction 'is to assist the jury in determining if the statement was in fact made.'" (*Ibid.* quoting *People v. Beagle, supra*, 6 Cal.3d at p. 456.)

Defendant's contention that the trial court failed properly to instruct the jury about how to view an oral admission relates to defendant's purported statement to the deputy sheriffs that "the guy we [the deputy sheriffs] were looking for ran and jumped the fence."[8] The trial court instructed the jury with CALICRIM No. 358[9] that "You have

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[8] Although not clear, we accept, for purposes of this argument, that defendant's statement constitutes an admission. (See *People v. McClary* (1977) 20 Cal.3d 218, 230 ["an admission is . . . the recital of facts tending to establish guilt when considered with the remaining evidence in the case"], overruled on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17.)

[9] Unmodified, CALCRIM No. 358 provides;

"You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether or not the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such [a] statement[s].

"[You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.]"

heard evidence that the defendant made an oral statement before the trial. You must decide whether or not the defendant made any such statement, in whole or in part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give to such a statement." The trial court did not instruct the jury with the second paragraph of CALCRIM No. 358 which provides, "You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Assuming that the trial court erred in failing properly to instruct with CALCRIM No. 358, any such error was not prejudicial. Here, as in *People v. Stankewitz, supra*, 51 Cal.3d 72, there is no reasonable probability that the jury would have reached a different result absent the error, because the testimony concerning defendant's oral admission was not contradicted, and defendant adduced no evidence that he did not make the statement, that the statement was fabricated, or that the statement was inaccurately remembered or reported. (See *id.* at p. 94.) Additionally, no conflicting testimony was presented concerning the precise words defendant used, their context, or their meaning. (*Ibid.*) Finally, as explained above the prosecution presented substantial evidence of defendant's guilt.

IV. Cumulative Error

Defendant contends that even if we do not reverse his judgment based on the prejudice arising from any of the individual issues he raises, we should reverse because the cumulative prejudicial effect of the *Wheeler/Batson*, prosecutorial misconduct, and instructional error issues rendered his trial fundamentally unfair and the jury's verdict constitutionally unreliable. Because we reject each of defendant's contended errors, there is no cumulative prejudicial effect justifying reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.